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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 594

LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of the said Union,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the New York State Court of Appeals is reported in 301 N E 2d 434, 33 N Y 2d 582, and reproduced as Appendix A annexed to the Petition for a Writ. The decision of the Appellate Division, First Department, of the New York State Supreme Court is reported in 346 N.Y.S. 2d 717, 42 A D 2d 693; and its order is reproduced as Appendix B. The opinion of Special Term of the Supreme Court, New York County (not yet reported), is reproduced as Appendix C.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Statute Involved

The provisions of Chapter 585 of the New York Laws of 1973 are set forth in the petition as Appendix D.

Questions Presented

1. Is this matter rendered moot inasmuch as the challenged statute will soon expire, the men have long since returned to work and the union has entered into a long-term collective bargaining agreement?

2. Does the upholding of the issuance of a preliminary injunction order satisfy the threshold requirement of finality prescribed by 28 U.S.C. § 1257?

3. Does the emergency police power enactment here challenged arbitrarily deny petitioners equal protection by creating an invidious discrimination against a particular class?

4. Does the statute fail to prescribe standards to guide the State Health and Industrial Commissioners in issuing the certifications required before the statute may be invoked, so as to deny petitioners due process?

5. Does the statute result in involuntary servitude prohibited by the Thirteenth Amendment to the United States Constitution?

Statement of the Case

Most of the factual and procedural background of the case will be found in the short syllabus which, although officially reported with the opinion of the New York Court of Appeals (33 N Y 2d 582), is not included in Appendix A. After noting the affirmance by the Appellate Division of the Special Term order granting the People's motion "for a preliminary injunction and enjoining defendants, a union of cemetery workers and the officers thereof, from, *inter alia*, engaging in a strike, concerted work stoppage or slow down during the pendency of the action", the syllabus continues (*id.* at 582-583):

> "On June 11, 1973, while defendant union was engaged in a strike against 47 cemeteries in the metropolitan area of New York City, the Governor signed into law chapter 585 of the Laws of 1973, which was based upon legislative findings that there existed in that area 'an emergency situation involving, potentially, the inability of many thousands of families to provide a decent burial for their deceased. This situation, if allowed to proceed unchecked, would constitute a serious threat to the health and welfare of the citizens of the state, cause untold grief to the bereaved families and seriously offend the public conscience'. It provided for emergency procedures to be initiated by executive order of the Governor upon receipt of certifications of the Industrial Commissioner and the Commissioner of Health, certifying that there existed a labor dispute involving cemeteries in that area which had not been resolved, could not be resolved through the employment of currently authorized collective bargaining procedures, and had resulted in an actual threat to the health and welfare of the residents of the State. It included provision for compulsory arbitration in the event the parties to the dispute could not

> arrive at a voluntary resolution; prohibited strikes while an executive order issued pursuant thereto was in effect; authorized the Attorney-General to apply to the Supreme Court, New York County, for injunctive relief against such strikes and for orders of compliance, and also provided that any party might apply to that court for clarification of a resulting arbitration award."

And finally (*id.* at 583):

> "On June 15, 1973, upon receipt of the requisite certifications, the Governor issued an executive order invoking the provisions of the statute and declaring them to be in full force and effect. In the present action by the Attorney-General for injunctive relief against defendants, they contended that the statute was unconstitutional, in that it deprived them of due process, was discriminatory, since it was directed solely to employees of cemeteries in the New York City metropolitan area, constituted an improper delegation of legislative power without standards or guidelines, and was applied arbitrarily and capriciously. The following question was certified by the Appellate Division: 'Was the order of the Supreme Court, as affirmed by this Court, properly made?'"

Answering in the affirmative, the Court of Appeals on July 3, 1973 upheld the preliminary injunction order (*ibid.*).*

The over-all strike, which began June 10, 1973 (on the heels of the "symbolic" striking in May of three cemeteries), continued until July 9, 1973, when the union membership returned to work under a settlement that became formalized later—in August—by a written contract. In the winter of 1970, an 8-week strike had been conducted against cemeteries of the same metropolitan area, resulting

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* On October 3, 1973, the remittitur of the Court of Appeals, together with the record of the proceedings before it, was filed in the office of the County Clerk, New York County, under the case Index No. 41308/1973.

in a prior enactment (Chapter 46 N.Y. Laws of 1970) to cope with the "emergency situation involving the inability of thousands of families to provide a decent burial for their deceased . . . [and] constitut[ing] a serious threat to the health and welfare of the citizens of the State . . .". The 1970 enactment is referred to in § 1 of the present statute (D1),* enacted in the hope of averting a more devastating strike in the heat of early summer.

It is the certification by the New York State (not City) Health Commissioner of a threat to the public health and welfare which, under § 2 of the instant statute (D2), is a prerequisite for invoking the prescribed emergency procedures via an executive order of the Governor. In this connection, however, the petition is so ambiguous as to be misleading. From its references (at 4, 5) to "the Commissioner of Health, Joseph Cimino" and "Commissioner Cimino", in their general as well as more specific context of "a statutory requirement that the Commisisoner of Health render a determination," the natural assumption would be that he is the *State* Health Commissioner. In truth, as the letterhead atop Appendix E will confirm (E1), he is the *City* Health Commissioner, who was neither required to nor did, in fact, "render a determination" to the Governor. Interestingly enough, Commissioner Cimino explicitly stated, in writing to *State* Health Commissioner Ingraham (whose certification was required and given), that "the threat of such a calamity [serious health hazard] is certainly in evidence [and] I strongly urge you to exercise the powers given to your office by recently enacted legislation . . ." (E2).

Reasons for Denying Certiorari

A.

Other considerations for the moment aside, the petition warrants denial in the exercise of discretion.

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* Appendix exhibits will be referred to by the exhibit letter and page number.

Not only will the emergency statute soon expire on February 1, 1974 (§ 4, D5); the strike issue itself became moot when the men returned to work on July 9, 1973 and, thereafter, the union entered into a collective bargaining contract which will expire December 31, 1975 (long after the statute). This Court has consistently refused to issue abstract pronouncements where, as here, the underlying question has been rendered moot, and there no longer remains any live case and actual, justiciable controversy. See *Local No. 8-6 Oil, Chemical and Atomic Workers (Oil Workers Union)* v. *Missouri,* 361 U.S. 363, 367 (1960). See also *Sears Roebuck* v. *Carpet Layers,* 397 U.S. 655 (1970); *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968); *Poe* v. *Ullman,* 367 U.S. 497, 508 (1961); *Brownlow* v. *Schwartz,* 261 U.S. 216 (1923); *California* v. *San Pablo and Tulare Railroad,* 149 U.S. 308 (1893).

B.

From the standpoint of basic jurisdiction, there would at very least appear to be grave doubt as to whether the state court determination tendered for review, upholding the issuance of a preliminary injunction order, satisfies the threshold requirement of finality prescribed by 28 U.S.C. § 1257.

There is, to begin with, no question of the interlocutory nature and non-finality of the determination under New York State law, as confirmed by the consideration of the case in the Court of Appeals on a question certified by the Appellate Division (Appendix A1, B2). See N.Y. Civil Practice Law and Rules § 5713, providing that where the Appellate Division authorizes appeal "from a non-final order, the order granting such permission . . . shall certify the questions of law decisive of the correctness of its determination . . .". This circumstance would plainly seem to preclude certiorari review by this Court in light of the finality requirement of 28 U.S.C. § 1257. Yet the jurisdictional question may be subject to an element of

doubt: on the one hand, the instant order might be regarded as final for § 1257 purposes under a case such as *Construction Laborers* v. *Curry*, 371 U.S. 542, 550 (1963); on the other, the more recent decision in *Chapman* v. *California*, 405 U.S. 1020 (1972), would strongly indicate to us that, just as under state law, it would now be regarded as interlocutory and non-final (and call for denial of certiorari) by this Court.

C.

Confronted with the powerful presumption of constitutionality, *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809 (1969), petitioners fall far short of overcoming it in attacking the statute on the merits.

In adopting the emergency legislation under attack, the New York Legislature undoubtedly acted in the exercise of its traditional police power, out of legitimate concern for the health and welfare of citizens of this State. It noted its express finding of the existence "in the New York city metropolitan area [of] an emergency situation"—an emergency which, "if allowed to proceed unchecked, would constitute a serious threat to the health and welfare of the citizens of the state" (§ 1 at D1).* Its further reference to earlier cemetery strikes in the area resulting in prior emergency legislation (*id.* at D1-2) underscores the urgent need for this new emergency statute. It is axiomatic that the state police power is extremely broad in scope, for "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive", *Berman* v. *Parker*, 348 U.S. 26, 32 (1954); and "[t]he police power of the State is the least limitable of all the powers of government", *Matter of Engelsher* v. *Jacobs*, 157 N E 2d 626, 627 (1959), 5 N Y 2d 370, 373, cert. den. 360 U.S. 902.

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* Of course, legislative findings are not properly the subject of judicial review, *Katzenbach* v. *Morgan*, 384 U.S. 641, 653; nor is the wisdom or necessity of the statute reviewable, *Ferguson* v. *Skrupa*, 372 U.S. 726, 730.

Petitioners' assertion that this emergency police power enactment denies them equal protection, by "creating an invidious discrimination against a particular class [consisting] of Metropolitan New York Cemetery Workers who are on strike" (petition at 2), is plainly without merit. The question of classification is one for the Legislature; its determination will be sustained where it is not purely arbitrary and any state of facts can be conceived to support the classification, the burden resting on the assailant to establish it is without any reasonable basis and essentially arbitrary, *Morey* v. *Doud*, 354 U.S. 457, 464 (1957); and see *Asbury Hospital* v. *Cass Co.*, 326 U.S. 207, 215 (1945); *N.Y. Rapid Transit* v. *City of New York*, 303 U.S. 573 (1938); *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

Here, emergency action by the New York Legislature was impelled for the second time in three years by a strike of cemeteries in the huge, densely-populated New York City metropolitan area. The 1973 strike (following about six months of unsuccessful negotiations) was even more menacing than its 1970 predecessor; its occurrence with the advent of summer gave greater reason to fear the spread of epidemic as the number of unburied bodies would, in this heavily populated area, increase rapidly and soon number in the thousands. Since the problem was created by the strike of cemetery workers in New York City's metropolitan area, there was obviously no one else and no other situs at which the statute could be aimed to effect a solution. Hence the classification rests upon an entirely reasonable and not arbitrary basis (it might well have been otherwise if extended to include cemetery workers outside of the problem area). Under these circumstances, statewide application of the statute was not required in order to satisfy equal protection requirements. See, *e.g.*, *Griffin* v. *School Board*, 377 U.S. 218, 230 (1964); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Walters* v. *City of St. Louis*, 347 U.S. 231, 237 (1954); *Salsburg* v. *Maryland*, 346 U.S. 545, 551 (1954).

Equally insubstantial is petitioners' claim of deprivation of due process because of supposed failure to prescribe sufficient standards to guide the (State) Health and Industrial Commissioners in issuing the certifications required before the statute may be invoked by gubernatorial order (in the state courts, below, the claim was raised only as to the Health Commissioner). As was pointed out in *Lichter* v. *United States,* 334 U.S. 742, 785 (1948), "it is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power". The same rationale or principle is followed by the New York State courts, *e.g. Matter of City of Utica* v. *Water Pollution Control Bd.,* 156 N E 2d 301, 304, 5 N Y 2d 164, 169, and other cases cited in the opinion below of the N Y Court of Appeals (A1). In view of the nature of the emergency found and acted upon by the State Legislature, no specific guidelines could furnish a better standard for certifying an "actual threat to health and welfare" than the expertise of the Health Commissioner used in making that determination—and so, too, with the expertise of the Industrial Commissioner in certifying inability of the parties to resolve their dispute through the usual collective bargaining procedures. To quote again from *Lichter, supra* (334 U.S. at 758): "Standards prescribed by Congress are to be read in the light of the conditions to which they are applied." In a situation such as here involved, specific guidelines might well result in paralysis were litigation to ensue over their precise meaning and application while the emergency, meanwhile, becomes progressively worse. Cf. *Weinberger* v. *Hynson, Westcott and Dunning, Inc.,* 412 U.S. 609.

Nor is there any substance in petitioners' contention respecting involuntary servitude. Such condition is non-

existent where one may quit his job or profession. *International Union* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1948); *United Mine Workers* v. *NLRB*, 184 F. 2d 392 (D.C. Cir. 1950); *Flood* v. *Kuhn*, 443 F. 2d 264 (2d Cir. 1971), affd. 407 U.S. 258. Petitioners' claim that the instant statute precludes a worker from quitting his job or calling, and taking another, is simply unfounded. The statute, properly read, makes evident that its thrust is directed only at strikes resulting from labor disputes not susceptible of being resolved through normal bargaining procedures. It is not reasonably to be understood as forbidding a worker to quit his job. Rather, it provides for the possibility of it becoming unlawful "to engage in or to induce or encourage any strike or withholding of services or lockout of employees" (§ 3 b at D5). This clearly refers to *concerted* walkouts or strikes, and plainly does *not* prohibit an individual from quitting his job and taking or seeking employment elsewhere.

D.

Petitioners also seek review of claims to the effect that the statute violates the supremacy clause by legislating in a field assertedly pre-empted by federal law, and deprives them of contract rights allegedly guaranteed them under federal law. These claims were not raised—much less passed upon—in the state court proceedings below; accordingly, they are not appropriate for review by this Court under well-settled principles, *e.g.*, *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-439 (1969); *Wilson* v. *Cook*, 327 U.S. 474, 480-481 (1946); *McGoldrick* v. *Compagnie Generale*, 309 U.S. 430, 434-435 (1939). Cf. U.S. Sup. Ct. Rule 23, subd. 1(f), 28 U.S.C.A.

In any event, there is no merit whatever in these claims. The statute, in essence, is essentially an emergency health and welfare—not labor—measure, adopted under the state police power. Moreover, petitioners did not even attempt, nor do they cite any authority, to show that the struck

cemeteries might be considered to be engaged in interstate commerce. Petitioners, without any documentation whatever (or any basis in the instant record), broadly state that the NLRB exercised jurisdiction over Local 365 "at times in the past" (Petition at 21). We understand that in two instances (both non-adversary proceedings), New York cemeteries voluntarily appeared in NLRB proceedings—a vast difference from any showing of meeting "the tests of interstate jurisdiction" (*ibid.*). But even assuming, momentarily, there was any "interstate jurisdiction" here, the circumstances are plainly such as to preclude any conclusion that federal law has deprived New York of its basic right to protect the health and welfare of its citizens under the challenged emergency statute. See *Vaca* v. *Sipes*, 386 U.S. 171, 180 (1967).

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should in all respects be denied.

November 30, 1973.

Respectfully submitted,

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